MK Associates Sdn Bhd v Tetuan Ganesan K & Muhammad Ashri (sued as a firm)

HIGH COURT (KUALA LUMPUR) — CIVIL ACTION NO S2–22–67 OF 2004
ASMABI MOHAMAD JC
25 MARCH 2011

Civil Procedure — Striking out — Writ and statement of claim — Application to strike out — Whether case obviously unsustainable and appropriate for disposal — Whether there were bona fide issues to be ventilated and decided — Delay in filing application — Delay of five years after pleadings deemed to be closed — Whether explanation of delay justified by defendant — Whether inordinate delay — Whether application should be allowed — Rules of the High Court 1980 O 18 r 19

Civil Procedure — Want of prosecution — Delay — Whether inordinate and inexcusable delay — Whether intentional or contumelious as to warrant dismissal for want of prosecution — Plaintiff wound up pursuant to court order — Official receiver appointed as liquidator of plaintiff — Lack of effort on part of liquidator to set case down for trial — Whether plaintiff to be penalised

The defendant applied to strike out the plaintiff's writ and statement of claim for want of prosecution and/or that the plaintiff's action was scandalous, frivolous or vexatious or otherwise an abuse of the process of the court under O 18 r 19(1)(b), (c) and (d) and/or pursuant to O 3 r 6 and/or O 92 r 4 of the Rules of the High Court 1980 ('RHC'). The plaintiff was a vendor of a piece of land in Mukim Serendah ('the land') and LK Ooi Development Sdn Bhd was the purchaser ('the purchaser') of the said land. The defendant was engaged by the plaintiff to act as its solicitor in respect of the sale and purchase agreement ('the agreement') whilst the purchaser was represented by Messr Azhar & Goh. The agreed purchase price for the said sale was RM9m. At the time of the execution of the said agreement, the land was charged to Hong Leong Bank Bhd ('HLBB'). The purchaser had obtained financial facility from United Merchant Finance Bhd ('UMFB') to finance the said purchase. The defendant had issued a letter to the purchaser's solicitors seeking, inter alia, for the release of the redemption sum to HLBB and also the balance sum of RM4m which was retained by the defendant as stakeholders pending the forwarding of the amended layout plan and a duly executed and registered Grant of Easement and Original Issue Document of Title by the plaintiff. Based on the undertakings by the defendant pursuant to the said letter, the redemption sum was paid to HLBB. The plaintiff alleged that it had only received a sum of RM700,000 leaving a sum of RM3.3m due and to be paid to the plaintiff

which was still being retained by the defendant as stakeholders. The plaintiff commenced this action against the defendant seeking for the return of the said sum from the defendant as stakeholders. In their defence the defendant alleged, inter alia, that they had released a sum of RM4m to the purchaser on the plaintiff's instruction, as the plaintiff's investment in the joint-venture project, and as such the plaintiff was *estopped* from demanding the said sum of RM3.3m from the defendant.

Held, dismissing the defendant's application with costs:

(1) The court would not strike out the plaintiff's action if the plaintiff was able to disclose some cause of action or has raised some questions fit to be tried. At this stage the court was not concerned with the strength or weaknesses of the plaintiff's case. However slight the chances were for succeeding, the plaintiff's action should not be struck out (see para 30).

(2) The plaintiff's application under O 14 of the RHC was dismissed by the court. In the course of the O 14 application, the defendant was not able to show to the court by way of documentary proof to whom the said balance sum of RM3.3m retained by the defendant as stakeholders was paid. It was also alleged that there was a verbal authorisation given to the defendant by the then management of the plaintiff for the release of the said balance sum and the said monies were released pursuant to the said verbal authorisation. There were bona fide issues to be ventilated and decided by the court and thus, this was not a clear-cut case that was obviously unsustainable as alleged by the defendant (see para 31).

(3) The law on striking out is clear that an application of this nature must be made promptly and as a rule, before the close of the pleadings. In this case, obviously there was an inordinate delay on the part of the defendant in filing this application to strike out the plaintiff's claim five years after the pleadings were deemed to be closed. The defendant had not explained to this court the delay in filing this application (see para 32).

(4) The plaintiff in this case had been granted a stay of a winding up order pending appeal, which is termed as a limited stay. Pursuant to the winding up order, the power to run the company in liquidation continues to rest in the liquidator. During the stay of the winding up order, there was nothing that the board of directors could have done to set the case down for trial as everything was left in the hands of the official receiver. The plaintiff ought not to be penalised for the lack of effort on the part of the liquidator to set the case down for trial. The delay in setting the case into motion was not intentional or contumelious as to warrant a dismissal for want of prosecution. In view of this, the plaintiff ought to be given the chance to proceed with the trial to enable the plaintiff to prove its claim against the defendant (see paras 36–39).

[Bahasa Malaysia summary

Defendan memohon untuk membatalkan writ dan penyata tuntutan plaintif bagi ketiadaan pendakwaan dan/atau bahawa tindakan plaintif bersifat skandal, remeh atau menyusahkan atau sebaliknya satu penyalahgunaan proses mahkamah di bawah A 18 k 19 (1) (b), (c) dan (d) dan/atau menurut A 3 k 6 dan/atau A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Plaintif adalah vendor sebidang tanah di Mukim Serendah ('tanah') dan LK Ooi Development Sdn Bhd adalah pembeli ('pembeli') tanah tersebut. Defendan diambil oleh plaintif untuk bertindak sebagai peguam bagi penjualan dan perjanjian pembelian ('perjanjian') manakala pembeli diwakili oleh Tetuan Azhar & Goh. Harga pembelian yang dipersetujui untuk dijual tersebut adalah RM9 juta. Semasa pelaksanaan perjanjian tersebut, tanah tersebut digadaikan kepada Hong Leong Bank Bhd ('HLBB'). Pembeli telah mendapat kemudahan kewangan dari United Merchant Finance Bhd ('UMFB') untuk membiayai pembelian tersebut. Defendan telah mengeluarkan satu surat kepada peguam cara pembeli yang memohon, antara lain, untuk pengeluaran jumlah penebusan kepada HLBB dan juga yang baki berjumlah RM4 juta yang telah disimpan oleh defendan yang merupakan pemegang amanah sementara menunggu penghantaran pelan rekabentuk dipinda dan geran disempurnakan dengan sewajarnya dan 'Grant of Easement and Original Issue Document of Title' didaftarkan oleh plaintif. Berdasarkan akujanji oleh defendan menurut surat tersebut, jumlah penebusan telah dibayar kepada HLBB. Plaintif mendakwa bahawa dia hanya menerima sebanyak RM700,000 menjadikan RM3.3 juta sebagai baki dan akan dibayar kepada plaintif yang masih disimpan oleh defendan sebagai pihak yang berkepentingan. Plaintif memulakan tindakan ini terhadap defendan memohon untuk pengembalian jumlah tersebut daripada defendan sebagai pihak yang berkepentingan. Dalam pembelaan mereka, defendan mendakwa, antara lain, bahawa mereka telah mengeluarkan RM4 juta kepada pembeli atas arahan plaintif, sebagai pelaburan plaintif dalam projek usaha sama, dan dengan itu, plaintif diestop daripada menuntut RM3.3 juta tersebut daripada defendan.

Diputuskan, menolak permohonan defendan dengan kos:

(1) Mahkamah tidak akan membatalkan tindakan plaintif jika plaintif telah berjaya mendedahkan beberapa punca tindakan atau telah menimbulkan beberapa soalan yang patut dibicarakan. Pada peringkat ini, mahkamah tidak mementingkan kekuatan atau kelemahan kes plaintif. Walaupun tipis peluang untuk berjaya, tindakan plaintif tidak perlu dibatalkan (lihat perenggan 30).

(2) Permohonan plaintif di bawah A 14 KMT telah ditolak oleh mahkamah. Semasa permohonan A 14, defendan tidak mampu untuk menunjukkan kepada mahkamah melalui bukti dokumen yang menunjukkan jumlah baki RM3.3 juta disimpan oleh defendan sebagai pihak yang berkepentingan, telah dibayar. Ia juga didakwa bahawa terdapat

kebenaran lisan yang diberikan kepada defendan oleh pihak pengurusan plaintif ketika itu bagi pelepasan daripada jumlah kira-kira tersebut dan berkata wang yang telah dikeluarkan adalah menurut kebenaran lisan. Terdapat isu bona fide yang perlu disuarakan dan diputuskan oleh mahkamah dan dengan itu, ini bukan kes yang jelas yang jelas tidak mapan seperti yang didakwa oleh defendan (lihat perenggan 31).

(3) Undang-undang bagi pembatalan adalah jelas bahawa permohonan seperti ini perlu dibuat dengan segera dan secara umumnya, sebelum penutup daripada pliding. Dalam kes ini, jelas terdapat kelewatan tidak dikawal di pihak defendan yang memfailkan permohonan ini untuk membatalkan tuntutan plaintif lima tahun selepas rayuan disifatkan ditutup. Defendan tidak menjelaskan kepada mahkamah ini kelewatan memfailkan permohonan ini (lihat perenggan 32).

(4) Plaintif dalam kes ini telah diberikan penangguhan rayuan penggulungan perintah yang belum selesai, yang disebut sebagai penggantungan terhad. Selaras dengan perintah penggulungan, kuasa untuk menjalankan syarikat sedang dalam proses pembubaran terus berehat di pelikuidasi. Semasa penangguhan perintah penggulungan, tiada apa yang boleh dilakukan oleh lembaga pengarah untuk menetapkan kes itu untuk dibicarakan kerana semuanya ditinggalkan di tangan penerima rasmi. Plaintif tidak patut dihukum kerana kekurangan usaha di pihak pelikuidasi untuk menetapkan kes bagi perbicaraan. Kelewatan dalam menetapkan kes itu beransur tidak sengajakan atau bersifat celaan untuk mewajarkan pemecatan kerana ketiadaan pendakwaan. Dalam pandangan ini, plaintif sepatutnya diberikan peluang untuk meneruskan perbicaraan bagi membolehkan plaintif membuktikan tuntutan terhadap defendan (lihat para 36–39).]

Notes:

For cases on writ and statement of claim, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7632–7635.

For cases on delay, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 8881–8961.

Cases referred to

Affin Bank Bhd v Eye Bee Sdn Bhd [2005] 7 MLJ 1; [2005] 1 LNS 291, HC (refd)

Aseambankers Malaysia Bhd v Ong Wee Meng [2009] 1 LNS 1445 (refd)

Bank Bumiputra Malaysia Bhd v Syarikat Gunung Tujuh Sdn Bhd & Ors [1989] 1 LNS 119; [1990] 1 MLJ 298, HC (refd)

Balwant Singh Purba v R Rajasingam [1996] 4 MLJ 404; [1995] 4 CLJ 491, HC (refd)

Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7 (refd)

A *Birkett v James* [1978] AC 297, HL (refd)
Chan Min Swee v Melawangi Sdn Bhd [2000] 7 MLJ 111; [2000] 7 CLJ 1, HC (refd)
Jamir Hassan v Kang Min [1992] 2 MLJ 46; [1991] 3 CLJ 2490, HC (refd)
Mohamad Nazri Abdul Aziz v Abu Samah Hj Wahab [2005] 8 CLJ 388, HC
B (refd)
Pengurusan Danaharta Sdn Bhd v Kasawa (M) Sdn Bhd [2004] 5 CLJ 474, HC (refd)
Pertamina v Kartika Ratna Thahir & Ors [1983] 1 MLJ 136 (refd)
C *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558; [1999] 2 CLJ 886, HC (refd)
Saripah bte Manap & Ors v Emar Sdn Bhd (in dissoiution) & Ors [1998] 1 MLJ 323; [1997] 4 CLJ 194, HC (refd)
Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1991] 3 MLJ 325;
D [1991] 1 CLJ (Rep) 436, SC (refd)
Syarikat Perumahan Lanchang Sdn Bhd v Pembangunan Akad Maju Sdn Bhd [1996] 1 LNS 403, HC (refd)
TM Feroze Khan & Ors v Meera Hussain bin TM Mohamed Mydin [2000] 1 MLJ 321; [1999] 4 CLJ 373, FC (refd)
E *Toh Hock Thye & Ors v Toh Chwee Biow* [1981] CLJ 292, HC (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1, PC (refd)
Thiruchelvasegaram Manickavasagar v Mahadevi Nachatiram [2001] 3 CLJ 743, HC (refd)
F *Vasudevan v Damodaran* [1994] 2 MLJ 31; [1974] 1 LNS 185 (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150, FC (refd)

Legislation referred to

National Land Code Form 17A
G Rules of the High Court 1980 O 1A, O 2, O 2 r 1, O 3 r 6, O 14, O18 r 19, O18 r 19(1)(b), (c), (d), O 92 r 4, Form 63

(Mathews Hun Lachimanan) for the plaintiff.
(Valen, Oh & Partners) for the defendant.

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Asmabi Mohamad JC:

INTRODUCTION

I **[1]** By summons in chambers dated 12 January 2011 (encl 47), the defendant has applied for an order to strike out the plaintiff's writ and statement of claim for want of prosecution and/or that the plaintiff's action is scandalous, frivolous or vexatious or otherwise an abuse of the process of the court under O 18 r 19(1)(b), (c) and (d) and/or pursuant to O 3 r 6 and/or O

92 r 4 of the Rules of the High Court 1980 ('RHC'). A

CAUSE PAPERS

[2] The relevant cause papers are as follows: B

(a) summons in chambers dated 12 January 2011 (encl 47);

(b) affidavit in support affirmed by Ganesan a/l Karuppannan on 7 January 2011 (encl 47a);

(c) affidavit in reply affirmed by Neoh Chin Wah on 31 January 2011 (encl 49); C

(d) further affidavit of Ganesan a/l Karuppannan affirmed on 28 January 2011 (encl 50); and

(e) all relevant affidavits filed for the purpose of the application under O 14 of the RHC. D

BACKGROUND FACTS

E

[3] The plaintiff was a vendor of a piece of land described as HS (D) 2053, PT No 1394, Mukim Serendah, Daerah Ulu Selangor, Selangor (the 'land') and LK Ooi Development Sdn Bhd was the purchaser (the 'purchaser') of the said land. The defendant was engaged by the plaintiff to act as its solicitor in respect of the sale and purchase agreement dated 31 March 1996 ('the agreement') whilst the purchaser was represented by Messr Azhar & Goh — The agreed purchase price for the said sale was RM9,000,000. F

[4] At the time of the execution of the said agreement the land was charged to Hong Leong Bank Bhd ('HLBB'). The purchaser had obtained financial facility from United Merchant Finance Bhd ('UMFB') to finance the said purchase. G

[5] Pursuant to the said agreement, the purchase price of the said land is to be paid in the following manner: H

(a) upon the execution of the agreement a deposit of RM900,000; and

(b) the balance of the purchase price of RM8,100,000 is to be paid as follows: I

(i) RM900,000 upon the plaintiff obtaining the approval from Foreign Investment Committee ('FIC') and the consent to transfer; and

(ii) RM7,200,000 to be paid within four months or a further extended period of two months upon the receipt of the approval from FIC and

consent to transfer. Parties have also agreed that the sum stipulated under this paragraph shall be paid as follows:

(A) a sum equivalent to a redemption sum, to be paid to HLBB;

(B) RM450,000 to be retained by purchaser's solicitors as a retention sum; and

(C) the balance sum to be paid to the plaintiff or the plaintiff's solicitors ('balance sum').

[6] The defendant had caused a letter dated 12 March 1997 to be sent to the purchaser's solicitors enclosing the relevant FIC approval as well as the consent to transfer for the solicitor's attention. In the same letter the defendant had sought the release of the redemption sum to HLBB and also the balance sum of RM4,000,000 which shall be retained by the defendant as stakeholders pending the forwarding of the amended lay-out plan and a duly executed and registered grant of easement and original issue document of title by the plaintiff.

[7] Based on the undertakings by the defendant pursuant to the letter dated 12 March 1997, the redemption sum was paid to HLBB. Vide a letter dated 21 March 1997 a cheque was issued by the said purchaser's solicitors payable to the defendant which was duly deposited into the defendant's account on 24 March 1997.

[8] The plaintiff alleges that it did not receive the balance sum due to it. Instead the defendants made the following payments:

(a) on 16 January 1997 – RM200,000;

(b) on 19 December 1997 – RM200,000;

(c) on 30 December 1997 – RM100,000;

(d) on 2 March 1998 – RM200,000; and

(e) on 28 October 1998 – RM493,802.71.

[9] In respect of the last payment made on 28 October 1998 in the sum of RM493,802.71 the plaintiff alleges that the said sum was inclusive of interest amounting to RM93,802.71 less RM50,000 as legal fees deducted by the defendant.

[10] The plaintiff alleges that the plaintiff has only received a sum of RM700,000 as shown in para 8 above leaving a sum of RM3,300,000 due and to be paid to the plaintiff which is still being retained by the defendant as stakeholders.

[11] The plaintiff then commenced this action against the defendant seeking for the return of the said sum from the defendant. A

[12] In their defence the defendant did not deny that they had been appointed as solicitors for the said agreement and in the course of that they had received the sum of RM4,000,000 from the purchaser's solicitors as stakeholders pending the plaintiff's fulfillment of the terms of the agreement which included the procurement of a duly executed Form17A under the National Land Code in respect of the easement over an adjoining piece of land and the amendment of the lay-out plan. B C

[13] The defendant alleges that these conditions were not fulfilled by the plaintiff and as there was delay in the fulfillment of these conditions the plaintiff and the purchaser negotiated and agreed to go into a joint-venture to develop the said land. Subsequent to that the plaintiff instructed the defendant to release the sum of RM4,000,000 to the purchaser to be treated as the plaintiff's investment in the joint-venture project. D

[14] Further the defendant alleges that due to economic and financial crisis parties to the agreement abandoned the project. The plaintiff then demanded from the purchaser for the payment of the purchase price. In December 1997 the purchaser paid the plaintiff the sum of RM500,000 through the defendant and subsequent to that another sum of RM200,000 was paid by the purchaser directly to the plaintiff. E F

[15] The defendant further alleges that on 23 March 1998 the parties to the agreement had entered into a supplemental agreement where both parties acknowledged that the balance sum of RM3,288,000 pursuant to the agreement remained due and owing from the purchaser. Pursuant to the supplemental agreement the purchase price was varied and increased by RM1,000,000. The parties had mutually agreed that a sum of RM550,000 had already been paid leaving a balance of RM450,000. Hence the final purchase price was agreed at RM3,738,000 (RM3,288,000 + RM450,000) plus interest at 10%pa on the said sum or any remaining sum unpaid from date of the supplemental agreement till date of realisation. G H

[16] The defendant say that they had released a sum of RM4,000,000 to the purchaser on the plaintiff's instruction as the plaintiff's investment in the joint-venture project as such the plaintiff is estopped from demanding the said sum of RM3,300,000 from the defendant. I

[17] The defendant also plead that the plaintiff's action is tainted by mala fide.

A THE DEFENDANT'S SUBMISSION

[18] In the course of the hearing before the learned counsel for the defendant submits that the plaintiff's claim ought to be dismissed for want of prosecution as the plaintiff had done nothing to set the case down for trial. It was only as late as of last year that the plaintiff, had without giving any notice of its intention to proceed with the case, served on the defendant Form 63. Learned counsel submits that there was inordinate/contumelious delay on the part of the plaintiff in setting the case down for trial thereby giving rise to serious prejudice to the defendant and the risk that a fair trial would not be possible. According to the defendant the file was in a slumber for almost five years from the time of the dismissal of the plaintiff's appeal to the judge in chambers against the deputy registrar's dismissal of the plaintiff's O14 application. Learned counsel further submits that notwithstanding that the plaintiff had been wound up on 5 December 2005 and a stay order had been granted by the court, that being the case there is no reason for the plaintiff's inaction. The official receiver had been appointed as a liquidator to manage the affairs of the plaintiff and the liquidator ought to have come into the shoes of the board of directors to set the case down for trial. In support of his argument on the issue of delay learned counsel of the defendant cites the case of *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150.

[19] The second ground relied upon by the defendant is that the plaintiff's claim ought to be struck out because it is frivolous, vexatious and an abuse of the process of the court as the purported claim by the plaintiff in this suit is baseless an unsubstantiated and contrary to plaintiff's own contemporaneous documents related to the subject matter.

[20] The plaintiff too had not made a full and frank disclosure of the relevant facts in the affidavits filed pursuant to the O 14 application including the managing director's confirmation that the defendant was acting on the direction of the plaintiff in releasing the balance sum to the purchaser.

[21] The plaintiff had also not pleaded that the agreement was superseded by a supplemental agreement dated 23 March 1999 entered into between the plaintiff and the purchaser which had varied the terms of the agreement. The plaintiff had in fact filed a proof of debt against the purchaser for the sum of RM3,738,000 which relate to the unpaid balance purchase price. Even the plaintiff's own audited account disclosed that for the financial year ending at 30 March 2003 a sum of RM3,738,000 is still due and owed by the purchaser. In order to recover the said sum the plaintiff had also commenced legal action against the purchaser vide High Court Shah Alam Suit No 22–25 of 2001 and had in fact obtained judgment in default against the purchaser. In addition to that the defendant alleged that the plaintiff's claim too is time barred.

[22] Learned counsel also submits that the plaintiff had lodged a police report against the defendant at the Dang Wangi Police Station vide Dang Wangi Report No 1705/2005 for breach of trust and the investigation disclosed that the investigation paper was classified as 'NFA (No Further Action)'. This proved that the defendant was not involved in any criminal misappropriation of the said sum.

[23] As regards the third ground relied upon by the defendant to strike out the plaintiff's case under O 3 r 6 and or under O 92 r 4 of the RHC learned counsel for the defendant submits that the defendant does not have to show prejudice but suffice for the defendant to show that there was inordinate delay on the part of the plaintiff to file the notice of intention to proceed and that the defendant had succeeded to prove the same.

SUBMISSION BY LEARNED COUNSEL FOR THE PLAINTIFF

[24] In rebutting the defendant's submission pertaining to the power of the court to strike out the plaintiff's claim under O18 r 19(1)(b), (c) and (d) of the RHC, learned counsel for the plaintiff submits that this order is only applicable in a situation where it is conspicuously clear that on the face of it, the plaintiff's claim is obviously unsustainable. However if the pleadings disclose some cause of action or raise some questions fit to be tried and decided, however slight the chances of succeeding, that cause should not be struck off. In an application of this nature the court too must exercise the power sparingly. See *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558; [1999] 2 CLJ 886, *Affin Bank Bhd v Eye Bee Sdn Bhd* [2005] 7 MLJ 1; [2005] 1 LNS 291, *Saripah bte Manap & Ors v Emar Sdn Bhd (in dissolution) & Ors* [1998] 1 MLJ 323; [1997] 4 CLJ 194.

[25] Further learned counsel submits that the defendant's application is misconceived as the defendant had used all three limbs under O 18 r 19(1)(b), (c) and (d) of the RHC cumulatively and this is unacceptable. See *Thiruchelvasegaram Manickavasagar v Mahadevi Nachatiram* [2001] 3 CLJ 743.

[26] As regards the delay in filing the application, learned counsel for the plaintiff submits that there is an unexplainable delay in the defendant's application to strike out the plaintiff's case. The proceedings were closed fourteen days after the reply was filed on 10 May 2004, that is, on 24 May 2004 and encl 47 was only filed on 12 January 2011. The defendant took almost five years after the pleadings were closed to file encl 47. For an application of this nature the defendant ought to have filed the application promptly and as a rule before close of pleadings. The defendant was not able to explain the reason for the delay in filing this application. It has been held by our courts that the delay

in filing the application under O18 r 19 of the RHC is fatal and as such the defendant's application ought to be dismissed on this ground alone.

[27] Learned counsel for the plaintiff submits that the omission on the part of the plaintiff to give notice of intention to proceed pursuant to O 3 r 6 of the RHC is merely an irregularity which is curable under O 2 r 1of the RHC by this court as there was no prejudice caused to the defendant. See *Aseambankers Malaysia Bhd v Ong Wee Meng* [2009] 1 LNS 1445; *Bank Bumiputra Malaysia Bhd v Syarikat Gunong Tujoh Sdn Bhd & Ors* [1990] 1 MLJ 298; [1989] 1 LNS 119 and O 2 of the RHC.

[28] In relation to the issue of dismissal for want of prosecution, learned counsel for the plaintiff submits that the power to dismiss for action for want of prosecution should be exercised only if the plaintiff's default had been intentional and contumelious and where there has been inordinate and inexcusable delay or if it would cause serious prejudice to the defendant. Learned counsel for the plaintiff submits based on the circumstances outlined to the court the default in this case is not intentional nor contumelious and/or had case caused and or would cause prejudice to the defendant.

THE COURT'S FINDINGS

Striking out under O 18 r 19 of the RHC

[29] It is trite law that only in plain and obvious cases that recourse should be had to the summary process under this rule and this summary process can only be adopted if on the facts, it can be clearly shown that the case is obviously unsustainable. The power to strike out under this order must be exercised with greatest care and in the clearest case. See *Chan Min Swee v Melawangi Sdn Bhd* [2000] 7 MLJ 111; [2000] 7 CLJ 1, *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, *Mohamad Nazri Abdul Aziz v Abu Samah Hj Wahab* [2005] 8 CLJ 388, *Pertamina v Kartika Ratna Thahir & Ors* [1983] 1 MLJ 136.

[30] The court would not strike out the plaintiff's action if the plaintiff is able to disclose some cause of action or has raised some questions fit to be tried. At this stage the court is not concerned with the strength or weaknesses of the plaintiff's case. However slight the chances are for succeeding, the plaintiff's action should not be struck out. See *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 (PC).

[31] The plaintiff in this case has filed an application under O 14 of the RHC which was dismissed by the court. In the course of the O 14 application some twenty affidavits were filed, ten affidavits from each side where each party

had presented its case on all issues raised. From the affidavits presented the defendant was not able to show to this court by way of documentary proof to whom the said balance sum of RM3,300,000 retained by the defendant as stakeholders was paid. It was also alleged that there was a verbal authorisation given to the defendant by the then management of the plaintiff for the release of the said balance sum and the said monies were released pursuant to the said verbal authorisation. After having perused the necessary cause papers presented to this court I am satisfied that there are bona fide issues to be ventilated and decided by this court. I am also satisfied that this is not a clear cut case that is obviously unsustainable as alleged by the defendant.

[32] The law on striking out is clear that an application of this nature must be made promptly and as a rule before the close of the pleadings. In this case obviously there is an inordinate delay on the part of the defendant in filing this application to strike out the plaintiff's claim five years after the pleadings are deemed to be closed. The defendant had not explained to this court the delay in filing this application. In regards to the delay in filing the O 18 r 19 application His Lordship Malik Ishak J (as His Lordship then was) said:

> *Time was certainly of utmost importance and any delay would be considered fatal.* (Emphasis added.) It is part and parcel of my judgment that there was delay on the part of the defendant when she filed the summons in chambers in encl 30 to strike out the amended statement of claim. It cannot be denied that encl 30 was filed after:
>
> (1) the pleadings were closed;
>
> (2) the summons for directions were filed …

(See *Thiruchelvasegaram Manickavasegar v Mahadevi Nachatiram* [2001] 3 CLJ 743, *Jamir Hassan v Kang Min* [1992] 2 MLJ 46; [1991] 3 CLJ 2490).

DISMISSAL FOR WANT OF PROSECUTION

[33] The principles of law on which the court is to exercise its power to dismiss an action for want of prosecution can be summarised from the judgment of Lord Diplock in *Birkett v James* [1978] AC 297 at p 318 as follows:

(a) that there has been intentional and contumelious default on the part of the plaintiff for instance disobedience to a preemptory order of the court or conduct amounting to an abuse of the process of the court; or

(b) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and such delay will result in a substantial risk that a fair trial of the issues is not possible as is likely to cause or to have caused serious prejudice to the defendant.

[34] The above principles have been quoted by the Malaysian Courts in *TM*

Feroze Khan & Ors v Meera Hussain bin TM Mohamed Mydin [2000] 1 MLJ 321; [1999] 4 CLJ 373, *Vasudevan v Damodaran* [1974] 1 LNS 185, *Toh Hock Thye & Ors v Toh Chwee Biow* [1981] CLJ 292; *Balwant Singh Purba v R Rajasingam* [1996] 4 MLJ 404; [1995] 4 CLJ 491 and numerous other cases. In short the above cases seem to suggest that this power must be exercised very sparingly and only in situations illustrated above.

[35] It was shown to this court that after the O14 application was dismissed by the learned senior assistant registrar the plaintiff had filed an appeal to the judge in chambers which was dismissed on 12 October 2005. The plaintiff was ordered to be wound up pursuant to an order of the court dated 5 December 2005 and an official receiver was appointed as liquidator of the plaintiff. On 8 December 2005 the plaintiff lodged an appeal to the Court of Appeal against the winding up order. A stay of the winding up order was granted on 27 April 2006 and about three years later, that is, on 25 March 2009 the plaintiff's appeal was dismissed by the Court of Appeal.

[36] It is trite law that once a company is wound up, save in limited circumstances, the board of directors of the company is effectively funtus officio and its functions will be assumed by the liquidator who in exercising his or her powers acts as the agent of the company. However the board of directors retains residuary powers only to challenge the winding up order which includes the authority to instruct solicitors to challenge the said order. The plaintiff in this case has been granted a stay of the winding up order pending appeal which is termed as a limited stay. Pursuant to the winding up order the power to run the company in liquidation continues to rest in the liquidator. See *Syarikat Perumahan Lanchang Sdn Bhd v Pembangunan Akad Maju Sdn Bhd* [1996] 1 LNS 403, *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325; [1991] 1 CLJ (Rep) 436, *Pengurusan Danaharta Sdn Bhd v Kasawa (M) Sdn Bhd* [2004] 5 CLJ 474.

[37] During the stay of the winding up order, there was nothing that the board of directors could have done to set the case down for trial as everything was left in the hands of the official receiver. However, pursuant to an order dated 16 August 2010 filed by the petitioner, the Government of Malaysia, Mr Neoh Chin Wah was appointed as the liquidator of the plaintiff and has since taken an active role in moving the case into motion.

[38] Further this case was called by the deputy registrar for case management on 3 November 2010 where directions were given for the plaintiff to file Form 63 and all the relevant documents for purposes of trial and for parties to comply with the said directions. The plaintiff ought not to be penalised for the lack of effort on the part of the liquidator to set the case down for trial.

[39] With this background in mind I am of the view that the delay in setting the case into motion was not intentional or contumelious as to warrant a dismissal for want of prosecution. In view of this the plaintiff ought to be given the chance to proceed with the trial to enable the plaintiff to prove its claim against the defendant.

FAILURE TO GIVE NOTICE OF INTENTION TO PROCEED/ INHERENT POWER

[40] I agree with the submission of learned counsel for the plaintiff that the omission to give notice of intention to proceed amounted to a mere irregularity curable by O 2 of the RHC and ought not in the circumstances of the case to nullify proceedings. See *Bank Bumiputra Malaysia Bhd v Syarikat Gunung Tujuh Sdn Bhd & Ors* [1990] 1 MLJ 298.

[41] For the foregoing reasons and pursuant to O 1A of the RHC I refuse to exercise the discretion vested in the court to strike out the plaintiff's claim pursuant to O 92 r 4 of the RHC.

CONCLUSION

[42] In the premise, I dismissed the defendant's application in encl 47 with costs.

Defendant's application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed